

No. 793719

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Petitioner/Respondent,

v.

MICHAEL ALLAN BOYD, Petitioner,

LEE GILES, Respondent,

MAUREEN ELIZABETH WEAR, Respondent

---

ANSWER TO AMICUS BRIEF OF NATIONAL CENTER FOR  
MISSING & EXPLOITED CHILDREN

---

Sheryl Gordon McCloud  
WSBA No. 16709  
Law Offices of Sheryl Gordon  
McCloud  
710 Cherry Street  
Seattle, WA 98104-1925  
(206) 224-8777  
Attorney for Amicus NACDL

Colin Fieman  
Georgia Bar No. 259690  
1331 Broadway, Suite 400  
Tacoma, Washington 98402  
(253) 593-6710  
Attorney for Amicus WACDL

Laura E. Mate  
WSBA No. 28637  
1601 Fifth Ave., Suite 700  
Seattle, WA 98101  
(206) 553-1100  
Attorney for Amicus WACDL

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2007 MAR -9 P 3:40  
BY RONALD R. CASPENTER  
CLERK

In its *amicus* brief, the National Center for Missing and Exploited Children (NCMEC) argues at length that child pornography is contraband and that its public dissemination is harmful. No one disputes these points. However, in moving beyond them to the real issue before this Court, namely how to strike a constitutionally permissible balance between the rights of a defendant and controlling access to evidence that is “contraband,” NCMEC offers several red herrings and misconstrues the law from other jurisdictions.

First, NCMEC pleads that “[t]he judicial system should not participate in increasing the amount of child pornography in the stream of commerce nor allow the defendant to enjoy the fruits of this crime by viewing these images repeatedly without limitation.” NCMEC Brief at 10. It should go without saying, however, that requiring limited disclosure to the defense for trial preparation does not further introduce pornography into the “stream of commerce.” The protective orders that have been routinely imposed on disclosure

in child pornography cases include safeguards to ensure that evidence provided to the defense is physically secured and not reproduced or inadvertently disseminated. These include such provisions as requiring defense experts to examine the evidence on computers that are not connected to the Internet and procedures for returning the evidence to the prosecution and its destruction after trial. WACDL & NACDL Brief Apps. B-F. NCMEC does not go so far as to suggest that defense counsel, as officers of the court, or experts retained by the defense would ever seek to distribute evidence entrusted to their care, nor does it cite a single instance in which evidence has been inadvertently mishandled by defense counsel and reached the “stream of commerce.”

NCMEC also misunderstands the realities of trial preparation when it argues that defendants should not be allowed to enjoy the “fruits of their crime” by repeated viewing of contraband evidence “without limitation.” NCMEC Brief at 10. Notably, NCMEC does not argue that defendants should be totally precluded from

personally reviewing the evidence against them. Even the federal Adam Walsh Act, legislation that was endorsed by NCMEC, expressly provides that defendants themselves must have “ample opportunity” to review the evidence in child pornography cases with counsel before trial. *See* 18 U.S.C. § 3509(m).

Further, no one suggests that defendants should have copies of the evidence “without limitation,” or that they should be provided with a personal set of images to view at their leisure while awaiting trial. Instead, trial courts have routinely required prosecutors to provide copies to defense counsel with appropriate limitations on their handling and viewing that afford security without sacrificing a defendant’s trial rights. Indeed, since NCMEC cannot argue that critical evidence in child pornography cases should be withheld from a defendant entirely, its main point appears to be that the discovery should take place only in a “government-controlled setting.”

NCMEC Brief at 13. It is unclear, however, how any legitimate concerns about allowing defendants to view evidence is allayed by

affording them “ample opportunity” to see it at a police station, rather than at an attorney’s office or a computer forensics lab. *See also, United States v. Frabizio*, 341 F. Supp. 2d 47, 51 (D. Mass. 2004) (granting defense motion for discovery pursuant to a protective order and noting “the government’s concern about re-victimization will be implicated regardless of where defense counsel and her expert view the images”).

Finally, NCMEC misconstrues most of the cases cited in its brief. In *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999), the Eighth Circuit concluded that a trial court had not abused its discretion in denying a defense request for copies of videotapes. *See* NCMEC Brief at 5. The court noted, however, that the defense had made no showing that its preparations for trial might be compromised by not having copies, and the case does not stand for the proposition that copies can be withheld when the defense has shown some need for copies. *See Horn*, 187 F.3d at 792-93. Indeed, in *Horn*, the court recognized that “[i]n a proper case, and

perhaps after a sufficient preliminary showing,” copying and disclosure of contraband images would be required. *Id.* at 792. It is also important to note that the case did not involve computers or digital images, the type of evidence of at the heart of most recent child pornography cases, where the need for independent analysis by the defense can be all but presumed. *See* WACDL & NACDL Brief at 10-15; *see also State v. Mandel*, 2004 WL 1774781 at \* 4 (Minn. App. 2004) (affirming dismissal of child pornography possession charges against defendant because the state failed to provide copies of digital images and other computer evidence to him and “effectively prevented respondent from a preparing a defense or even confirming the provenance of the images from which the charges arose”).

NCMEC also relies on *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), which did involve computer evidence. *See* NCMEC Brief at 5. But there again the federal court emphasized that the defense had made no showing of prejudice when the trial

court limited its access to the evidence. *Kimbrough*, 69 F.3d at 731.

Further, several court have expressly rejected even the limited conclusions in both *Horn* and *Kimbrough*, instead holding that a fair trial requires prosecutors to copy and produce the core evidence in child pornography cases for independent review by the defense. For example, in *Cervantes v. Cates*, 76 P.3d 449 (Ariz. Ct. App. 2003), the Arizona Court of Appeals discussed *Horn* and *Kimbrough* and found they offered little guidance because they considered whether possible discovery errors were harmless post-conviction, not whether a defendant who made a timely showing of need was entitled to disclosure. *Id.* at 455.<sup>1</sup> More pertinently, the Arizona court rejected

---

<sup>1</sup> NCMEC misstates the relevant case law by citing *Cervantes* for the proposition that “the rights of the defendant are not unconstitutionally impacted even though the images are not reproduced to them.” NCMEC Brief at 6. Even a cursory reading of the opinion reveals that the court reached entirely the opposite conclusion.

Inexplicably, NCMEC also cites *Nevada v. Second Judicial District*, 89 P.3d 663 (2004), for the same proposition. In fact, the Nevada Supreme Court rejected arguments virtually identical to those advanced by the State in this case, held that “denying defense counsel copies of the child pornography hinders the defendant’s right

the State's claims that it was "illegal" to copy contraband evidence for a defendant *Id.* at 456. The court instead adopted the reasoning of the California Court of Appeals in a similar case, finding that "the State's reasoning was absurd because such an extension of the statute [proscribing distribution of child pornography] would make it a crime to be able to defend against the charges and nothing in the statute prohibited copying of the images for use by the defense in preparing for trial." *Id.*, citing *Westerfield v. Superior Court*, 121 Cal. Rptr. 2d 402 (Cal. Ct. App. 2002).

The Arizona court also dismissed the State's concerns about how the defense would handle the material, since "a protective order limiting disclosure to counsel, prohibiting any further copying, and requiring defense counsel's agents to use the materials solely for the case and to return them to the State should be sufficient." *Cervantes*,

---

to effective assistance of counsel," and affirmed an order requiring the prosecution to copy and produce a contraband videotape for the defense. *Id.* at 667-68.

76 P.2d at 456. *See also Frabizio*, 341 F. Supp. 2d at 50 (noting that *Horn* and *Kimbrough* merely held that a trial court did not abuse its discretion in denying a request for copies when the “defendants failed to present compelling arguments” for disclosure, and ordering disclosure where defense expert had submitted an affidavit explaining the need for independent analysis); *United States v. Cadet*, 423 F. Supp. 2d 1 (E.D.N.Y. 2006) (discussing *Horn* and *Kimbrough*, and ordering copying and disclosure).

In *Westerfield* itself, a trial court had denied the defense’s request for copies of digital images based on the State’s argument that a California statute, similar to RCW 9.68A.090, prohibited the production or dissemination of child pornography except by “law enforcement and prosecuting agencies” for prosecution and law enforcement purposes. 121 Cal. Rptr. at 403. The California Court of Appeals, however, ordered disclosure based on the “obvious intent of the Legislature” to criminalize public dissemination of child pornography. *Id.* at 404. The Court reasoned that, if the statute had

been intended to extend to evidence in criminal actions themselves,  
“there would be no conceivable way for the state to try these cases  
for the alleged child-pornographers to defend against the charges.”

*Id.*

In short, NCMEC’s arguments do little to advance the Court’s  
consideration of the issues in the instant cases. No one disputes that  
the victims of child pornography must be treated with sensitivity and  
that the evidence in child pornography cases must be handled with  
care. Neither the State nor NCMEC, however, have offered any  
persuasive reasons to believe that a defendant’s rights to prepare for  
trial, examine the evidence against him, and receive a fair trial must  
be compromised to protect either victims or society from  
dissemination of child pornography. Instead, the long-held practice  
in most trial courts of granting full disclosure pursuant to protective  
orders is an effective and proven means of balancing a defendant’s

//

//

rights and any legitimate concerns the State or others may have about the handling of sensitive evidence.

DATED this 9th day of March, 2007.

Respectfully submitted,

s/ Sheryl Gordon McCloud  
WSBA No. 16709  
Attorney for Amicus NACDL

s/ Colin Fieman  
Georgia Bar No. 259690  
Attorney for Amicus WACDL

s/ Laura E. Mate  
WSBA No. 28637  
Attorney for Amicus WACDL

## CERTIFICATE OF SERVICE

I certify that on the 9th day of March, 2007, a true and correct copy of the foregoing ANSWER TO AMICUS BRIEF OF NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN was served upon the following individuals by depositing same in the United States Mail, first class, postage prepaid:

Seth Fine  
Assistant Chief Criminal Deputy  
Snohomish County Prosecutor's  
Office  
3000 Rockefeller M/S 504  
Everett, WA 98201

Margaret L. Zimmer  
Office of Legal Counsel  
The National Center for Missing &  
Exploited Children  
699 Prince Street  
Alexandria, VA 22314

Barbara L. Corey  
Attorney for Petitioner Michael  
Allan Boyd  
901 S. I St., Suite 201  
Tacoma, WA 98405

Michael Schwartz  
Attorney for Respondent Lee Giles  
524 Tacoma Ave. S.  
Tacoma, WA 98402

Mary K. High  
Attorney for Respondent Maureen  
Elizabeth Wear  
949 Market St., Suite 334  
Tacoma, WA 98402

Gerald R. Horne  
Pierce County Prosecuting Attorney  
Kathleen Proctor  
Pierce County Prosecutor's Office  
Hugh Birgenheier  
Pierce County Prosecutor's Office  
930 Tacoma Ave. S., Rm. 946  
Tacoma, WA 98402  
Counsel of Record for the State

Pamela Beth Loginsky  
Washington Assoc. of Prosecuting  
Attorneys  
206 - 10th Ave. S.E.  
Olympia, WA 98501-1399

s/ Sheryl Gordon McCloud

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2007 MAR -9 P 3:40  
BY DONALD R. CARPENTER  
CLERK